Remarks

Amendments to claims 1 and 14 are to correct antecedent basis. No new matter has been added.

I. Claim Rejections under 35 U.S.C. § 103.

Claims 1-3, 8-16, and 21-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Application Publication US 2003/0005419 (Pieper) in view of *Portable Software Library Optimization*, 2/1998 (Cain). Applicant respectfully requests that the § 103 rejections be withdrawn for at least the reasons set forth below. Also, Applicant submits that the below arguments have not been presented previously, and respectfully requests that they be considered and addressed by the Examiner should the Examiner be inclined to maintain the rejections.

A. Pieper does not disclose or suggest the limitations regarding the second optimized form of the software program.

Claim 1 recites:

> (a) optimizing the software program such that a resulting first optimized form of the software program is completely independent of the target processor and is at least partially coded in the high-level language, determining a first performance profile for the first optimized form of the software program, and comparing the first performance profile with the performance objectives;
>
> (b) based on results of comparing the first performance profile with the performance objectives, *if the performance objectives are not met by the first optimized form of the software program*, then optimizing the first optimized form of the software program such that a resulting second optimized form of the software program includes at least one portion that is dependent on the target processor and is coded in the high-level language.
>
> (Emphasis Added)

Claim 14 recites similar limitations. Thus, the claims describe: (a) obtaining a first optimized form of a software program that (1) is "completely independent" of the target processor and (2) is at least partially coded in high-level language, and then (b) if performance objectives are not met by the first optimized form, obtaining a second optimized form having at least one portion that (1) is "dependent" on the target processor, and (2) is coded in high-level language. According to page 3 of the Office Action, paragraphs 31, 20, and 45 of Pieper allegedly disclose the limitations in (b) above. Applicant respectfully disagrees.

Pieper discloses a process 50 in which the source code 52 is optimized in step 58 to obtain a first optimized code 60 that is substantially independent (or "independent" as modified by the Examiner based on Cain) of the architecture of the target processor 12 (see figure 2 and corresponding passage of Pieper). In the process 50, the optimized code 60 is then translated and converted to machine-dependent code 74. Notably, the code 74 in Pieper is obtained from conversion (i.e., not optimization) of the first optimized code 60, and is not obtained from a second optimization (see figure 2). Thus, to the extent that the machine-dependent code 74 in Pieper is analogized as the claimed second optimized form (with at least one portion that is dependent on the target processor), the code 74 clearly is not a "second optimized form" that is obtained by "optimizing" the first optimized code 60, as described in step (b) above the claims.

Also, in Pieper, the conversion from the first optimized code 60 to the machine-dependent code 74 is not *conditioned upon* whether the performance objectives are met or not by the first optimized code 60. As shown in the flow chart in figure 2 of Pieper, the machine-dependent code 74 is always obtained because steps 62-70 occurs after the first optimized code 60 is obtained. Thus, Pieper as modified by Cain clearly does not disclose or suggest any processor dependent optimized form of a software program that is *conditioned upon* whether the performance objectives are met or not by the first optimized form of a software program (note the limitation "if" in the claims).

In addition, Applicant notes that in Pieper, an execution analysis process 76 is performed only <u>after</u> the machine-dependent code 74 is obtained. Thus, to the extent that the machine-dependent code 74 is analogized as the claimed second optimized form (with at least one portion that is dependent on the target processor), Pieper clearly does not disclose or suggest, and in fact teaches away, that such code 74 is conditioned upon results of the analysis process 76.

Cain also does not disclose or suggest the above limitations, and therefore fails to make up the deficiencies present in Pieper. Since both Pieper and Cain do not disclose or suggest the above limitations, any purported combination of these references cannot result in the subject matter of claims 1 and 14. For at least the foregoing reasons, claims 1 and 14, and their respective dependent claims, are believed allowable over Pieper, Cain, and their combination.

B. Cain does not disclose or suggest the limitations regarding "flagging."

Claim 1 also recites *flagging* the at least one portion to indicate that the at least one portion is dependent on the target processor *if the first optimized form of the software program is optimized to create the second optimized form of the software program* (Emphasis Added). Claim 14 recites similar limitations. Applicant agrees with the Examiner that Pieper does not disclose the above limitations. According to the Office Action, page 7 of Cain discloses "#include" directive, which is purported to be the claimed "flagging." However, Applicant respectfully notes that Cain describes "#include" directive as being used to retrieve a system-specific API mapping source code. Thus, the "#include" in Cain is an actual function, and is not a "flagging" as purported in the Office Action (and certainly not a flagging "to indicate that at least one portion is dependent on a target processor" as described in the claims).

Also, Applicant respectfully notes that there is nothing in Cain that discloses or suggests that any act of flagging is *conditioned upon* whether "the first optimized form of the software program is optimized to create the second optimized form of the software program" as described in the claim (i.e., note the limitation "if" in the claims).

Since both Pieper and Cain do not disclose or suggest the above limitations, any purported combination of these references cannot result in the subject matter of the claims. For these additional reasons, Applicant respectfully requests that the § 103 rejection be withdrawn.

C. Combination of references cannot be made in hind sight

Furthermore, Applicant respectfully submits that the § 103 rejections should be withdrawn for the additional reason that the purported reason to combine the references was clearly made in hind sight – which is improper. In particular, Applicant notes that the Examiner did not previously apply Cain for the alleged disclosure of "completely independent of the target processor" limitation, and did so for the first time only after the BOAI has pointed out that Cain discloses such limitation. However, the BOAI did not provide any reason for combining the alleged element of Cain with the method of Pieper. As a result, the Examiner then retroactively (retroactive because it was done only after the BOAI pointed out the alleged element in Cain) provides a reason to combine the alleged feature. Thus, hindsight was clearly used to provide the reason for the purported combination.

Applicant respectfully submits that it is improper to use *hind sight* for combining references. In particular, it is improper to use hind sight to find a reason to combine references only after an element is allegedly found in a reference. In this case, regardless of whether Cain actually discloses the above limitations or not, it would be improper to retroactively use hind sight to look for a reason to combine the alleged feature of Cain with Pieper. Since the prima facie case of the § 103 rejections cannot be based on application of hindsight, Applicant requests that the § 103 rejection based on Cain and Pieper be withdrawn.

CONCLUSION

If the Examiner has any questions or comments regarding this response, please contact the undersigned at the number listed below.

To the extent that any arguments and disclaimers were presented to distinguish prior art, or for other reasons substantially related to patentability, during the prosecution of any and all parent and related application(s)/patent(s), Applicant(s) hereby explicitly retracts and rescinds any and all such arguments and disclaimers, and respectfully requests that the Examiner re-visit the prior art that such arguments and disclaimers were made to avoid.

The Commissioner is authorized to charge any fees due in connection with the filing of this document to Vista IP Law Group's Deposit Account No. **50-1105,** referencing billing number **CA7017922001**. The Commissioner is authorized to credit any overpayment or to charge any underpayment to Vista IP Law Group's Deposit Account No. **50-1105,** referencing billing number **CA7017922001**.

Respectfully submitted,

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